SUPREME COURT, U. S.

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No. 1315

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

CANTON POULTRY, INC., GEORGIA BROILERS CORPORATION, COTTON PRODUCERS ASSOCIATION, d/b/a GOLDKIST POULTRY GROWERS, INC., and TIP TOP POULTRY, INC.,
Appellants,

vs.

DOYLE CONNER, Commissioner of Agriculture of the State of Florida,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION

JURISDICTIONAL STATEMENT

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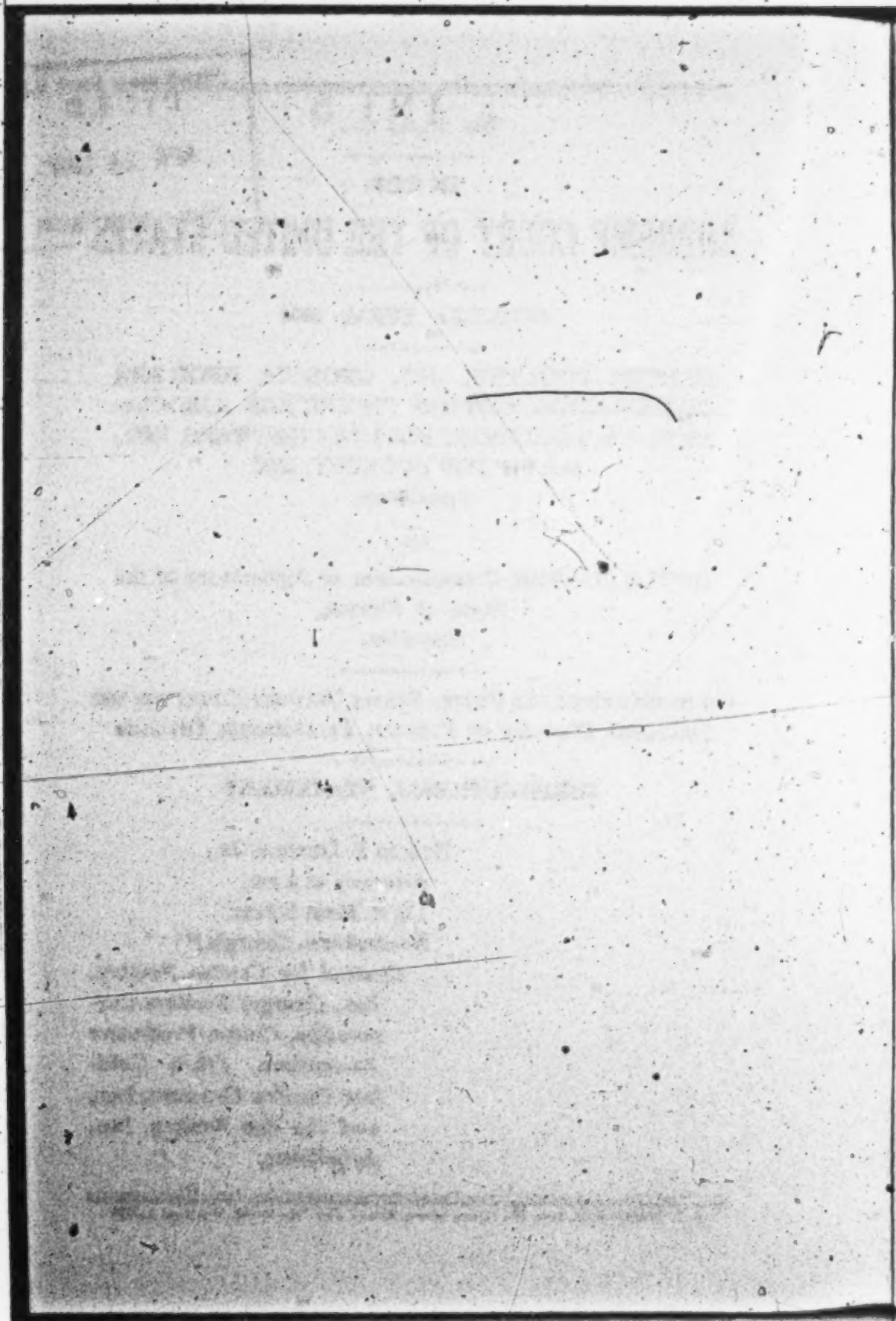

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IN THE

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OCTOBER TERM, 1966

CANTON POULTRY, INC., GEORGIA BROILERS CORPORATION, COTTON PRODUCERS ASSOCIATION, d/b/a GOLDKIST POULTRY GROWERS, INC., and TIP TOP POULTRY, INC.,
Appellants,

vs.

DOYLE CONNER, Commissioner of Agriculture of the State of Florida,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the three-Judge United States District Court for the Northern District of Florida, Tallahassee Division, entered on February 9, 1967, and filed on February 10, 1967, determining and declaring so much of the Florida Poultry Law, Chapter 583, et.

seq., Florida Statutes, 1961, as requires the inspection of poultry products brought into the State of Florida for sale and the collection of an inspection fee on such poultry products, to be constitutional and valid and the refusal to grant injunctive relief against Appellee, Doyle Conner, Commissioner of Agriculture of the State of Florida, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the District Court for the Northern District of Florida, Tallahassee Division, is not yet reported. A copy of the opinion of the District Court is attached hereto as "Exhibit A."

JURISDICTION

This suit was brought under 7 U. S. C. A. 1621, et seq.; 21 U. S. C. A. 451, et seq.; 28 U. S. C. A. 1331; and 28 U. S. C. A. 2281, et seq. for injunctive relief against loss and damage by violation of Article I, Section 8, Clause 3, and the 14th Amendment of the Constitution of the United States. The judgment of the District Court was entered on February 9, 1967 and filed on February 10, 1967, and the Notice of Appeal was filed in that Court on February 27, 1967. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28. U. S. C. A., Section 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

Townsend v. *Yeomans*, 301 U. S. 441, 57 Sup. Ct. 842, 81 L. Ed. 1210;

Shafer v. *Farmers Grain Co.*, 268 U. S. 189, 45 Sup. Ct. 481, 69 L. Ed. 909;

Sligh v. *Kirkwood*, 237 U. S. 52, 35 Sup. Ct. 501, 59 L. Ed. 835;

Camfield v. *United States*, 167 U. S. 518, 17 Sup. Ct. 864, 112 L. Ed. 260.

Campbell v. *Hussey*, 82 Sup. Ct. 327, 368 U. S. 297, 7 L. Ed. 2d 299.

QUESTIONS PRESENTED

As stated in the Notice of Appeal, the questions presented are:

(1) Do the provisions of the Florida Poultry Law that are complained of impose a burden on interstate commerce that is prohibited by the commerce clause of the Federal Constitution?

(2) Is the State of Florida precluded under the Federal Poultry and Poultry Products Inspection Act from levying an inspection fee on poultry and poultry products which are processed and inspected in Georgia under the provisions of the Federal Poultry and Poultry Products Inspection Act and then shipped to Florida for sale to the ultimate consumer?

(3) Does the State of Florida have the power to require the reinspection and the collection of an inspection fee on poultry and poultry products shipped into that state for sale?

(4) Do the provisions of the Florida Poultry Law that are complained of deny to appellants and others similarly situated equal protection of law, in violation of the 14th Amendment to the Constitution of the United States?

(5) Do the provisions of the Florida Poultry Law that are complained of deprive appellants and others similarly situated of their private property without due process of law, in violation of the 14th Amendment to the Constitution of the United States?

STATUTES INVOLVED

Federal Poultry and Poultry Products Inspection Act, 21 U. S. C. A. § 451-469.

Florida Poultry Law, Chapter 583, Florida Statutes, 1961.

STATEMENT

Appellants, who are engaged in the business of processing poultry and poultry products for shipment and sale in interstate commerce, filed complaint seeking to enjoin the appellee, as Commissioner of Agriculture of the State of Florida, from enforcing the Florida Poultry Law, Chapter 583, Florida Statutes 1961, and the rules and regulations promulgated thereunder whereby appellee requires an inspection fee and labeling of poultry and poultry products which have already been inspected and passed as wholesome and fit for human consumption under Federal regulations issued under the Federal Poultry and Poultry Products Inspection Act. Appellants contended that the Florida Poultry Law, as so applied, is unconstitutional, because (1) under the Supremacy Clause it must be deemed displaced by the Federal statute; (2) its application to appellants' products deny appellants equal protection of the laws in violation of the 14th Amendment; (3) its application to them unreasonably burdens or discriminates against the interstate marketing of their products in violation of the Commerce Clause.

The complaint alleged, inter alia, that the appellants are owners and/or operators of establishments in which poultry is slaughtered and poultry products are prepared for transportation and sale in interstate commerce; that

their processing plants had been designated as "official establishments" by the Secretary of Agriculture of the United States of America and that he renders inspection at their official establishments of all poultry slaughtered and of all poultry products processed; that the Secretary of Agriculture renders such inspection service under the authority of the Federal Poultry and Poultry Products Inspection Act together with the rules and regulations promulgated thereunder; that at these official establishments all of the poultry products must be inspected, handled, prepared, marked and labeled as required by Federal Law; that these processing plants must be constructed, equipped, and operated in compliance with the rules and regulations promulgated by the Secretary of Agriculture in order to receive the inspection service provided by him, that appellants had invested approximately $2,450,927.09 for the designing, building and equipping of their processing plants of which approximately $644,240.76 was expended in order to comply with the requirements of the Secretary so as to enable plaintiffs to receive Federal Inspection Service. Further, that during the twelve months period immediately preceding the filing of the complaint, that plaintiffs paid to the Federal Government a total of $30,464.00 covering the cost of overtime inspection service, and that under the Federal Poultry and Poultry Products Inspection Act, appellants are prohibited from processing, selling, or offering for sale, transporting, or delivering or receiving for transportation in interstate commerce any of their poultry products for human consumption unless such poultry products have been inspected for wholesomeness by Federal inspectors and unless the shipping container and the immediate container are marked in accordance with the provisions of the Federal statute. The complaint further alleged that under the Florida statutes, the appellants were designated as a "dealer" in that they are proces-

sors engaged in the business of selling, offering for sale, or holding for the purpose of sale in Florida dressed poultry in excess of 100 pounds in any week, that are free from disease; that the State of Florida levies a one-eighth of one cent per pound tax, as an inspection fee, on their poultry products which have already been inspected and passed as wholesome by federal inspectors; that the State of Florida requires appellants to attach to each carcass a label or wing-tag which is not required under the Federal Poultry and Poultry Products Inspection Act; that the purported inspection fee, cost of the tag to be affixed to each chicken carcass, the labor of attaching the wing-tags to each carcass, places an additional operating expense on appellants of approximately one-fourth of one cent per pound of processed poultry and that this additional expense to appellants has in effect raised an economic barrier against the transportation and sale of their products in the State of Florida to such an extent that certain of the appellants have never been able to ship their products into Florida for sale, others have ceased shipping their products into the State of Florida, and the remainder will be forced to cease shipping their products into Florida.

The appellee, in his answer, admitted that he was Commissioner of Agriculture of the State of Florida, that he was enforcing and will continue to enforce the provisions of the Florida Poultry Law and the rules and regulations thereunder, admitted the allegations in the complaint pertaining to the provisions of the Florida Poultry Law, and the rules and regulations promulgated thereunder, together with the provisions of the Federal Poultry and Poultry Products Inspection Act and the rules and regulations promulgated thereunder by the Secretary of Agriculture. The appellee, in his answer, further contended that the Florida Poultry Law was enacted for the purpose of up-

grading the quality and standard of poultry products, of insuring the consuming public of Florida of high quality, eatable poultry products, of providing to consumers in Florida identifiable and ascertainable grades of such products so that they would know what they were buying and consuming; that the Florida statute complements and supplements the Federal law as to wholesomeness in that the Federal law is not completely effective because of the highly perishable nature of the product and the distance and time necessary to reach the destination of the consuming area after the Federal inspection takes place and finally, that the Florida law is purely a local police measure enacted in the interest of the public health of the people of Florida, and that without the Federal law, the Florida market would become a "dumping ground for bad quality poultry".

Thereafter, on January 21, 1965, the case was heard by the three-Judge District Court and the decision was rendered on February 9, 1967 and filed on February 10, 1967, denying appellants the injunctive relief they sought and holding that the Florida Poultry Law is not unconstitutional on the grounds as alleged in the complaint.

THE QUESTIONS ARE SUBSTANTIAL

The Federal Poultry and Poultry Products Inspection Act of 1947, 71 Stat. 441, 21 U. S. C. A. 451 et seq., was enacted to establish uniform standards of poultry products, to meet the need of a uniform standard of processing of wholesome poultry and poultry products and to establish a system of compulsory inspection by the Federal Government of such poultry and poultry products as to prevent the movement in interstate commerce of unwholesome or adulterated poultry products. Congress found that the wholesome poultry products are an important source of the nation's total food supply, that the marketing of whole-

some poultry products is effected with the public interest and directly affect the welfare of the people, and that it was essential to have disinterested persons inspect poultry and poultry products moving in interstate commerce in order to prevent unwholesome and adulterated poultry products, which are injurious to the public welfare, adversely affect the marketing of wholesome poultry products, result in sundry losses to producers, and destroy markets for wholesome poultry products, from entering the channels of interstate commerce. To achieve this purpose, Congress authorized the Secretary of Agriculture to promote rules and regulations providing for sanitary regulations of "official establishments" where poultry is processed for shipment in interstate commerce; for ante mortem inspection, post mortem inspection, and re-inspection of the carcass of each bird processed in an official establishment and for the proper labeling with an official inspection mark of the shipping containers of poultry products inspected and found wholesome under the Act.

The Secretary has implemented this Act with regulations governing the inspection of poultry and poultry products. The Congressional intent to pre-empt the field in providing a uniform standard for the processing and inspection of poultry moving in interstate commerce and making an express prohibition against State regulations in this field is clearly shown in 21 U. S. C. A., § 467 (a) (b) wherein Congress granted exclusive jurisdiction to the Secretary for the inspection of poultry and poultry products.

Despite the fact that Congress, under the provisions of the Federal Poultry and Poultry Products Inspection Act, manifested its intentions to occupy the entire field in regulating the processing and inspection of all poultry products sold or offered for sale, introduced, delivered

for introduction, transported or received for transportation in interstate commerce, the appellee seeks to usurp the constitutional powers of Congress and place his own regulatory power on such poultry products moving in interstate commerce.

It is well settled that, whenever federal regulations are so pervasive as to manifest a Congressional intent to occupy the field of regulation, State regulation with respect to the same subject matter is precluded. *Campbell* v. *Hussey*, 82 Sup. Ct. 327, 368 U. S. 297, 7 L. Ed. 299; *Missouri Pacific* v. *Porter*, 273 U. S. 341, 346; *Rice* v. *Santa Fe Elevator Corporation*, 331 U. S. 218, 230; *Hood & Sons* v. *DuMond*, 336 U. S. 525, 543.

The appellee, in his defense, contended and the three-Judge Federal Court in the trial of the case at bar ruled that one of the reasons for the enactment and the constitutionality of the Florida Poultry Law was that the State Act is purely a local police measure enacted in the interest of the public. In its decision the three-Judge Court completely overlooked the Congressional declaration that transactions involving the processing, shipment, and sale of poultry products directly affect the welfare of the people nationwide and are not matters of local concern. The three-Judge Federal Court made this ruling in the face of the ruling by the Supreme Court in the case of *Sligh* v. *Kirkwood*, 237 U. S. 52, 59; this Court said:

> "That Congress has exclusive power to regulate commerce is beyond question and when that authority is asserted by the State, even in the exercise of the police power, it may not interfere with the supreme authority of Congress over the subject; . . ."

As another ground for his defense, the appellee contended that poultry products are of a highly perishable nature and that the Florida statute is essential to be sure that the poultry products have not deteriorated from the

time they leave the processing plant until their ultimate purchase by the consumer. The three-Judge Federal Court in its ruling concurred in appellee's contention and completely ignored the ruling of this Court in the case of *Lemke* v. *Farmers Grain Company*, 258 U. S. 50, 42 Sup. Ct. 244, 66 L. Ed. 458, where it was held as follows:

> "It is alleged that such legislation is in the interest of grain growers and essential to protect them from fraudulent purchases, and to secure payment to them of fair prices for the grain actually sold. This may be true, but Congress is amply authorized to pass measures to protect interstate commerce if legislation of that character is needed. The supposed inconveniences and wrongs are not to be redressed by sustaining the constitutionality of laws which clearly encroach upon the field of interstate commerce placed by the Constitution under federal control."

The overwhelming weight of the evidence in the trial of this case demanded the finding that the natural and legal effect of the Florida Poultry Law in its operation, in view of the compulsory inspection required of appellants under the Federal Poultry and Poultry Products Inspection Act, is that it works an irrational discrimination against appellants and other processors in like plight. The Courts have repeatedly held that a statute must be tested by its operation and effect rather than its proclaimed purposes. See *Near* v. *Minnesota*, 283 U. S. 697, 75 L. Ed. 1357, 51 Sup. Ct. 625; *Lockner* v. *New York*, 198 U. S. 45, 49 L. Ed. 937, 25 Sup. Ct. 539.

In the trial of this case the uncontroverted evidence shows that the enforcement of the Florida Poultry Act has raised an economic barrier on the interstate flow of poultry and poultry products so that certain of the appellants have never been able to ship their products into the State of Florida, others have been forced to cease shipping their products into Florida, and the remainder will be

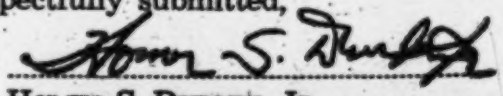
forced to cease shipping their products into Florida. In *The Minnesota Rate Cases*, 230 U. S. 352, 57 L. Ed. 1511, this Court held:

> "If a State enactment imposes a direct burden upon interstate commerce, it must fall regardless of federal legislation. The point of such an objection is not that Congress has acted, but that the State has directly restrained that which in the absence of federal regulations should be free; . . . . The power of Congress to regulate commerce among the several states is supreme and plenary. It is 'complete in itself, may be exercised to its utmost extent and acknowledges no limitations other than are prescribed in the Constitution.' . . . . It has been repeatedly declared by this Court as to those subjects which require a general system of or uniformity of regulation, the power of Congress is exclusive."

The questions submitted are of such vital importance to the many persons affected that this Court should review the decision of the District Court in that that decision, it is submitted, erroneously holds that the provisions of the Florida Poultry Law are constitutional and valid.

We believe that the questions presented by this appeal are substantial and that they are of utmost public importance.

Respectfully submitted,



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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

CANTON POULTRY, INC., GEORGIA BROILERS CORPORATION, COTTON PRODUCERS ASSOCIATION, d/b/a GOLDKIST POULTRY GROWERS, INC., and TIP TOP POULTRY, INC., Plaintiffs,

vs.

DOYLE CONNER, COMMISSIONER OF AGRICULTURE OF THE STATE OF FLORIDA, Defendant.

Tallahassee Civil Action No. 1033

Before JONES, Circuit Judge, and CARSWELL and McRAE, District Judges:

CARSWELL, District Judge:

Findings of Fact and Conclusions of Law

Plaintiffs, Georgia poultry processors, brought this action against the Florida Commissioner of Agriculture to restrain the enforcement of certain provisions of Chapter 583, Florida Statutes, relating to the inspection, grading and tagging of poultry products within the State of Florida[1] and the rules and regulations promulgated thereunder.[2]

1. Fla. Stat. §§ 583.13, 583.14, 583.17-583.20 (1961).

2. Florida Administrative Code, Rules of the Department of Agriculture, Chapter 7E-7.02, .05, .06, .09.

This Court was convened in accordance with the provisions of 7 U. S. C. 1621, et seq.; 21 U. S. C. 451, et seq.; and 28 U. S. C. 2281, et seq.

Plaintiffs contend that the subject Florida laws and regulations are unconstitutional as applied to them because: (1) they unduly burden interstate commerce; (2) the federal law has preempted the field of poultry inspection and regulation; and (3) its application to plaintiffs denies them equal protection of the laws in violation of the 14th Amendment.

FINDINGS OF FACT

The plaintiffs are owners and operators of establishments which process poultry for transportation and sale in interstate commerce, much of it within the State of Florida. Poultry is inspected in these plaintiffs' establishments before interstate shipment by United States Department of Agriculture inspectors pursuant to the Federal Poultry and Poultry Products Inspection Act[3] and the rules and regulations promulgated thereunder.[4] The Florida statutes, together with its rules and regulations, provide for the inspection, grading and tagging of poultry products sold within the State of Florida and authorize the collection of an inspection fee to defray the expenses of administering the statute. The inspection fee is payable to the first person to sell, offer for sale, or hold for the purpose of sale in Florida any dressed poultry on which the inspection fee has not been paid.[5]

The Florida law also provides for the grading of poultry according to standards of quality as established

3. 21 U.S.C. §§ 451-469 (1957).
4. 7 CFR §§ 70.1-81.207.
5. Fla. Stat. § 583.18(4) (1961).

by the Act.[6] The evidence presented on trial shows that a thorough federal inspection of plaintiffs' poultry for wholesomeness is made at plaintiffs' establishments outside Florida. The evidence also shows, however, that there is only very limited federal inspection of poultry shipped into the State of Florida. It was established here that there are only three United States regulatory inspectors charged with the responsibility of checking some 9,913 retail stores and some 200 wholesale outlets in Florida. Moreover, one of these three men must perform some duties in six other southeastern states, averaging about ten weeks a year in Florida. Another federal inspector, the record shows, is actually assigned to the southwestern Georgia area and only rarely performs inspection work in Florida. The remaining federal inspector does devote virtually all of his time to his official duties within Florida, but can only cover a small percent of Florida outlets for poultry.

Any poultry in Florida discovered by the federal inspector to be contaminated must actually be removed from public sale by a stop sale order issued under the provisions of the Florida poultry law.[7] The federal inspector makes application to the State Commissioner's office for this authority.

The extent of inspections made by Florida personnel is in strong contrast to the limited volume of regulatory inspection made by the United States Department of Agriculture. During 1964 there were 42,254 regulatory inspections made at nearly all of the retail and wholesale outlets which distribute poultry in Florida. This regulatory inspection work was carried on by 46 inspectors, all of whom are State of Florida personnel and all of whom have

6. Fla. Stat. § 583.17 (1961).
7. Fla. Stat. § 583.18(2) (1961).

the individual authority to issue stop sale orders on any poultry products they find to be unwholesome. The Florida Department of Agriculture condemned approximately 76,800 pounds of poultry as unfit for human consumption between July 1, 1963, and January 1, 1965. Significantly, approximately one-half of this condemned poultry had been previously inspected by inspectors of the United States Department of Agriculture and shipped from without the State of Florida. The evidence shows that about 90% of Florida processed poultry is for intrastate consumption, and, therefore, does not have federal inspection for wholesomeness.

CONCLUSIONS OF LAW

Plaintiffs first contend that the Florida poultry law is unconstitutional as an undue burden on interstate commerce. We disagree.

We note at the outset that the Florida law operates after the product has completed its interstate journey and has lost its character as interstate commerce. The police power of the state is therefore exerted after the product acquires its character as intrastate commerce.[8]

The Florida law provides for the inspection, grading and tagging of poultry products sold within the state. A state may adopt measures for the health and safety of its people although commerce may incidentally be involved. See *Sligh v. Kirkwood*, 237 U. S. 52 (1915).

About 38,000 pounds of federally inspected poultry shipped into Florida over an eighteen months period was subsequently condemned by the State. In light of this finding, it cannot seriously be contended that the Florida law is not protective of the health and safety of the State.

8. Fla. Stat. § 583.16 (1961).

State legislation, based on police power, which does not discriminate against interstate commerce is not is not in conflict with the Commerce Clause. See *Huron Portland Cement Co.* v. *City of Detroit*, 362 U. S. 440, 80 S. Ct. 813, 4 L. Ed. 2d 852. The state act is applied to locally produced poultry offered for sale in Florida as well as poultry shipped into the State. Any burden which might result from compliance with the state law rests equally upon the local distributors, and is therefore nondiscriminatory.

It is the second contention of plaintiffs that Congress, by passage of the Federal Poultry and Poultry Products Inspection Act has preempted the regulation of poultry so as to exclude poultry regulation by Florida.

The facts are persuasively to the contrary. Moreover, the federal poultry act is primarily designed to prevent the entry of contaminated poultry into the stream of interstate commerce. This is insured by the extensive federal poultry inspection at the plaintiffs' warehouses before interstate shipment. The Florida law, however, regulates the same product at the other end of the stream of commerce in the same manner in which it regulates similar products which are solely intrastate in character. The Supreme Court held in *Florida Lime & Avocado Growers* v. *Paul*, 373 U. S. 132, 83 S. Ct. 1210, 10 L. Ed. 2d 248, that "Congressional regulation of one end of the stream of commerce does not, ipso facto, oust all state regulation at the other end. . . ." See also *Swift* v. *Wickham*, 230 F. Supp. 398 (S. D. N. Y. 1964), wherein it was held that the federal poultry law did not preempt weight and labeling regulations promulgated under New York's Agricultural Markets Act.

We also note here in consideration of all of plaintiffs' arguments the highly perishable character of poultry prod-

ucts, the geography of the area which requires out of state poultry shipments into Florida to move considerable distances, especially to metropolitan areas at the southern extremity of the peninsula, and particularly the fact that federal inspection is patently insufficient to protect the well being of the poultry consuming public within the State of Florida.

Finally, we cannot say that plaintiffs have been denied the equal protection of the law as assured by the Constitution. The Florida poultry law as applied to these plaintiffs is not arbitrary or unreasonable. See *Allied Stores of Ohio* v. *Bowers*, 358 U. S. 522, 79 S. Ct. 437, 3 L. Ed. 2d 480. Upon this record we find plaintiffs' contention that their compliance with both federal and state poultry laws works to their economic disadvantage, although plaintiffs concede that Florida processors who ship only in intrastate commerce are also subject to the same tax and tagging provisions.

Accordingly, judgment is entered for defendant.

DATED this 25th day of January 1967.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CANTON POULTRY, INC., GEORGIA BROILERS CORPORATION, COTTON PRODUCERS ASSOCIATION, d/b/a GOLDKIST POULTRY GROWERS, INC., and TIP TOP POULTRY, INC.,
Plaintiffs,

vs.

DOYLE CONNER, COMMISSIONER OF AGRICULTURE OF THE STATE OF FLORIDA,
Defendant.

Tallahassee Civil Action No. 1033

Final Judgment

(Filed February 10, 1967)

In accordance with findings of fact and conclusions of law entered this date and the Court having determined therein that judgment should be entered in behalf of the defendant and against the plaintiff, it is, therefore, hereby

ORDERED that judgment be and it is hereby entered for the defendant and against the plaintiff with costs to be taxed against the plaintiff by the Clerk of this Court in accordance with law.

DONE AND ORDERED this 9th day of February, 1967.

/s/ Warren L. Jones

Warren L. Jones
United States Circuit Judge

/s/ G. Harrold Carswell

G. Harrold Carswell
United States District Judge

/s/ Wm. A. McRae, Jr.

William A. McRae, Jr.
United States District Judge

APPENDIX B

Florida Poultry Law

CHAPTER 583

Florida Statutes, 1961

CLASSIFICATION AND SALE OF POULTRY

583.01 *Definitions.*—In construing this chapter, where the context permits, the words, phrases, or term:

(1) "Commissioner" within the intent and purposes of this chapter shall mean the Florida commissioner of agriculture.

(13) "Dealer" in poultry shall mean any person, firm or corporation, including processors and retailers, engaged

in the business of selling, offering for sale or holding for the purpose of sale in this state any dressed poultry in excess of one hundred pounds in any one week, that are free from disease.

(14) "Broker" shall mean any person, firm or corporation who sells dressed poultry in this state for a dealer on a commission basis.

(15) "Processor" shall mean any person, firm or corporation slaughtering and dressing poultry for commercial purposes.

(16) "Poultry" shall mean all kinds of poultry and shall include chickens, turkeys, ducks, guineas, geese, pigeons and other domesticated food birds.

583.04 *Promulgation of regulations.*—The commissioner of agriculture may make and promulgate such regulations as may be necessary to carry out the provisions of this chapter.

583.06 *Employment of assistants.*—The commissioner of agriculture may employ such assistants as are necessary to carry out and enforce the provisions of this chapter, such assistants to be paid out of the general inspection trust fund.

583.12 *Live and dressed poultry.*—Live and dressed poultry are classified as:

(1) Live poultry, construed to mean fowl, not diseased, to be slaughtered for human consumption.

(2) Florida dressed, construed to mean any fowl, free of disease, slaughtered and offered for sale in Florida, that have not been hard-chilled or frozen.

(3) Shipped (state of origin) dressed, construed to mean any fowl, free of disease, produced and slaughtered

outside of Florida, that have not been hard-chilled or frozen.

(4) Quick frozen, or frozen, construed to mean any fowl that have been processed, packed, sealed and frozen in strict conformity with accepted standards for quick freezing, or frozen, that have not developed any appearance of cold storage stock and show no evidence of deterioration from freezing.

(5) Storage (or cold storage) fowl, construed to mean all fowl free from disease and regardless of where slaughtered, that show evidence of deterioration from freezing or that which have been held at low temperature for sixty days or more.

583.13 *Dealers to mark slaughtered poultry as to grade.*—

(1) It is unlawful for any dealer or broker to sell, offer for sale, or hold for the purpose of sale in the state any slaughtered poultry without clearly imprinting thereon or attaching thereto a label or tag, not less than two inches in diameter on which shall be plainly and legibly printed the classification, grade and standard to which the same belong. Whenever shipped, fresh dressed or cold storage poultry are sold, offered for sale, or held for the purpose of sale packed in a container other than an air-tight container, such container shall have affixed a label, not less than two inches by four inches on which shall be plainly and legibly printed in letters not less than three-eighths inch in height, the classification, grade and standard to which the contents of such container belong.

(2) It is unlawful to offer poultry for sale in any newspaper advertisement, circular, radio, or other form of advertising without plainly designating in such adver-

tisement the classification, grade, and standard to which the poultry being offered for sale properly belong.

(3) It is unlawful for any person, firm or corporation to use dressed poultry in the preparation of food served to the public, or to hold dressed poultry for the purpose of such use, unless such dressed poultry has clearly imprinted thereon or attached thereto a label or tag, not less than two inches in diameter, on which shall be plainly and legibly printed the classification, grade and standard to which the same belong. Whenever shipped, fresh dressed or cold storage poultry are used in the preparation of food served to the public, or held for the purpose of such use, packed in a container other than an air-tight container, such container shall have affixed a label, not less than two inches by four inches on which shall be plainly and legibly printed in letters not less than three-eighths inch in height the classification, grade and standard to which the contents of such container belong.

583.14 *Certification of poultry dealers.*—It is unlawful to sell, offer for sale, or hold for the purpose of sale any poultry as a dealer or broker unless such person has obtained from the commissioner of agriculture a certificate authorizing such person to engage in the business of selling poultry in Florida. Such certificate shall be subject to revocation by the commissioner of agriculture for cause. All such certificates shall be permanent registration and effective until revoked; provided that all certificates heretofore or hereafter issued shall serve as valid certificates until replaced with permanent certificates by the commissioner of agriculture.

583.15 *Reports of poultry dealers.*—The commissioner of agriculture may require every dealer and broker granted a certificate and every person, firm or corporation, using

dressed poultry in the preparation of food served to the public on which inspection fee has not been previously paid to keep records of all purchases, sales, receipts or other transactions pertaining to the sale, purchase or use of dressed poultry and to mail to the office of the commissioner of agriculture at Tallahassee, duplicate copies of all invoices, or equivalent information, showing the consignor, the consignee, the quantity, source and classification of poultry included in each purchase or sale, or such other information as the commissioner may require; and the commissioner may prescribe the forms to be used to give such information.

583.16 *Interstate shipments exempt.*—This law shall not apply to any shipment of live or dressed poultry while the same constitutes a bona fide shipment in interstate commerce, but shall apply at the very instant when an interstate shipment comes to rest within the state and the police power may be asserted thereon, or whenever such interstate shipment loses its character as such.

583.17 *Grades and standards for fowls.*—The commissioner of agriculture may determine, establish and promulgate, from time to time reasonable grades and standards of quality as to each or all of the classifications for fowl to be sold or offered for sale in the state, such as will, in his judgment, promote honest and fair dealing in the interest of the consumer; and he may alter or modify such grades and standards of quality from time to time, as in his judgment honest and fair dealing in the interest of the consumer may require; provided, however, that the grades and standards of quality so fixed by the commissioner of agriculture shall be based upon requirements not exceeding the requirements necessary to meet the grades and standards of quality prescribed by the United States department of agriculture, or which may hereafter be pre-

scribed by such United States department of agriculture, and the tolerance to be allowed shall be the same as is allowed in each grade or standard of quality by the United States department of agriculture.

The commissioner of agriculture may also make and promulgate such regulations as may be necessary to carry out the provisions of this law.

583.18 *Inspection by commissioner.*—The commissioner of agriculture, his inspectors or agents, in carrying out the provisions of this law:

(1) (a) May enter on any business day during the usual hours of business, any store, market or other building or place where poultry is sold, offered for sale, or held for the purpose of sale, in order to ascertain by inspection whether in the exhibition of such poultry all of the provisions and conditions of this chapter or any rule or regulation duly promulgated in relation to the sale, offering for sale, or holding for the purpose of sale have been complied with.

(b) May upon good and sufficient cause to believe that any of the provisions of this law are being violated, stop and inspect any truck or other vehicle engaged in the transportation of poultry upon the highway, to be sold, offered for sale, or held for the purpose of sale in Florida, and to make such examination or inspection thereof as is necessary to ascertain whether all of the provisions of this chapter or any rule or regulation duly promulgated thereunder relating to the quality and wholesomeness, grade and standard required by the provisions of this law have been complied with.

(2) May issue and enforce a stop sale notice or order, or a stop use notice or order, to the owner or custodian

of any lot of poultry which the commissioner or his inspectors or agents find, or have good reason to believe, are in violation of any of the provisions of this law or any regulation issued hereunder, which shall prohibit further sale, barter, exchange, distribution or use of such poultry until the commissioner of agriculture is satisfied that the law or regulation has been complied with and has issued a written release or notice to the owner or custodian of such poultry.

(3) May enter on any business day during the usual hours of business any restaurant kitchen, hotel dining room kitchen, or the kitchen of any other public eating place where dressed poultry is used in the preparation of food served to the public, and to make such examination and inspection thereof as is necessary to ascertain whether all of the provisions of this chapter or any rule or regulation duly promulgated thereunder relating to the quality and wholesomeness, grade and standard required by the provisions of this law have been complied with.

(4) An inspection fee of not less than one-eighth of one cent per pound nor more than one-fourth of one cent per pound is hereby imposed, and shall be paid to the commissioner of agriculture on all dressed poultry sold by dealers in this state and on all dressed poultry used in the preparation of food served to the public, if the fee had not been previously paid, which said inspection fee shall be paid by the dealer who first sells, offers for sale or holds for the purpose of sale dressed poultry in this state or by any person, firm or corporation using dressed poultry in the preparation of food served to the public, on which inspection fee has not been previously paid.

It is unlawful for any dealer to sell, offer for sale or hold for the purpose of sale in this state any dressed

poultry on which said inspection fee shall not have been paid, and it is unlawful to use, or hold for the purpose of use, in this state any dressed poultry in the preparation of food served to the public on which said inspection fee shall not have been paid. The manner of collection of such inspection fee shall be as prescribed by the commissioner of agriculture who is hereby authorized to so prescribe and enforce the method and manner of collecting same. All such fees so collected shall be paid into and become a part of the general inspection trust fund of the state.

(5) The possession of more than one hundred pounds of dressed poultry in any one week by any dealer or broker or any person, firm or corporation using dressed poultry in the preparation of food served to the public, shall be deemed held for the purpose of sale or for the purpose of use in the preparation of food served to the public.

538.19. *Sale of unsound, etc., fowls prohibited.*—It is unlawful for any person to sell fowl, live or dressed, which is unsound, unhealthful, unwholesome, diseased or otherwise unfit for human consumption.

583.20 *Penalties for violations of chapter.*—

(1) Any person violating any provision of this chapter, or any rule or regulation promulgated by the commissioner of agriculture within this chapter, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be imprisoned in the county jail for not more than ninety days or shall be fined in a sum not less than fifty dollars nor more than two hundred dollars. In addition thereto, the commissioner may revoke the certificate of any dealer convicted of any violation of this chapter.

(2) In addition to the remedies provided in this chapter and notwithstanding the existence of any adequate remedy at law, the commissioner of agriculture is hereby authorized to apply by a bill in equity to a circuit court or circuit judge and such circuit court or circuit judge shall have jurisdiction upon hearing and for cause shown to grant a temporary or permanent injunction, or both, restraining any person from violating or continuing to violate any of the provisions of §§ 583.01, 583.05, 583.09, 583.12, 583.14, 583.18, 583.20 or from failing or refusing to comply with the requirements of said §§ 583.01, 583.05, 583.09, 583.12, 583.14, 583.18, 583.20 or any rule or regulation duly promulgated as in § 583.04 authorized. Such injunction shall be issued without bond.

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SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. ~~131~~ 5

October Term, 1966

CANTON POULTRY, INC., GEORGIA BROILERS CORPORATION, COTTON PRODUCERS ASSOCIATION, d/b/a GOLDKIST POULTRY GROWERS, INC., and TIP TOP POULTRY, INC.,

Appellants,

vs.

DOYLE CONNER, Commissioner of Agriculture of the State of Florida,

Appellee.

On Appeal From the United States District Court for the Northern District of Florida, Tallahassee Division

STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO DISMISS AND/OR AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

No._____

October Term, 1966

CANTON POULTRY, INC., GEORGIA BROILERS CORPORATION, COTTON PRODUCERS ASSOCIATION, d/b/a GOLDKIST POULTRY GROWERS, INC., and TIP TOP POULTRY, INC.,

Appellants,

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Appellee.

On Appeal From the United States District Court for the Northern District of Florida, Tallahassee Division

STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO DISMISS AND/OR AFFIRM

MOTION TO DISMISS AND/OR AFFIRM

The appellee in the above styled cause moves to dismiss and/or affirm on the grounds that the appellants have improperly attempted to have this Court assume jurisdiction over the cause

and that the questions are so unsubstantial as not to need further argument.

STATEMENT OF FACTS

The appellants who are engaged in the business of processing poultry and poultry products for shipment and sale in interstate commerce, filed a complaint under 28 U.S.C. §2281 seeking to enjoin the appellee as Commissioner of Agriculture of the State of Florida from enforcing the Florida Poultry Law, Chapter 583, Florida Statutes, 1961, and the rules and regulations promulgated thereunder whereby the appellee requires an inspection fee and labeling of poultry and poultry products which, in accordance with Section 583.18 (4), Florida Statutes, shall be paid by the dealers of the State of Florida on all dressed poultry used in the preparation of food served to the public and which inspection fee shall be paid by the dealers who first sell and offer for sale or hold for the purpose of sale dressed poultry in the State of Florida, or by any person, firm or corporation using dressed poultry in the preparation of food served to the public on which an inspection fee has not been previously paid.

Chapter 583, Florida Statutes, 1961, and the rules and regulations promulgated thereunder clearly indicate that the law does not apply to any shipment of live or dressed poultry while the same constitutes a bona fide shipment in interstate commerce but does apply at the very instance when an interstate shipment comes to rest within the State of Florida, and the police power may then be asserted thereon, or at any time such interstate shipment loses its character as such. The appellant contended in the lower Court that the Florida Poultry Law as applied is unconstitutional because:

1. Under the supremacy clause it must be deemed preempted by the Federal Poultry and Poultry Products Inspection Act of 1947, 71 Stat. 441, 21 U.S.C.A. 451, et seq; and

2. Its application to the appellants' product denies the appellants equal protection of the laws in violation of the 14th Amendment of the U.S. Constitution; and

3. Its application to the appellants herein unreasonably burdens and discriminates against the interstate marketing of their products in the State of Florida in violation of the commerce clause of the U.S. Constitution.

The appellants in the presentation of proof and evidence in the lower Court were unable to show, in fact, that federal inspectors did make rounds of the storage warehouses or retail establishments where poultry is being stored or offered for sale in the State of Florida to look and see if the poultry, which at one time was inspected and found wholesome under the Federal Poultry and Poultry Products Inspection Act is still in that same wholesome condition. The Court during the trial of the case asked the following question, to wit:

> "Do the federal inspectors, without somebody calling them in, make the rounds of storage warehouses or retail establishments where poultry is being stored or offered for sale to look and see if the poultry which at one time was inspected and found wholesome is still in that wholesome condition?"

The record in this cause indicated that one man who is the U.S Department of Agriculture chief regulatory inspector for the State of Florida, along with six other southeastern states, to wit, North Carolina, South Carolina, Georgia, Tennessee, Alabama

and Mississippi, was responsible for regulatory inspection activities with the poultry division of the U.S. Department of Agriculture, and that he had available to assist him in the inspection activities under the Federal Poultry and Poultry Products Inspection Act the services of two other federal inspectors who are involved in the regulatory inspection activities of the State of Florida. These men are stationed in Tampa, Florida, and Thomasville, Georgia. The facts also evolved that the one man stationed in Tampa, Florida, was primarily responsible for egg inspections.

The facts and the evidence in this cause indicate that, on the other side of the ledger, the Poultry and Egg Division of the Florida Department of Agriculture conducted inspections under Chapter 583, Florida Statutes, and made 42,254 inspection calls at 9,913 retail stores and 200 wholesale outlets that distributed poultry to the retail stores in the State of Florida during the year 1964 alone.

Appellants also demonstrated through their witnesses and evidence that any poultry in Florida, discovered by federal inspectors to be contaminated, must actually be removed from public sale by stop-sale order issued under the provisions of the Florida Poultry Law. The federal inspectors, not having any stop-sale authority, must make application to the appellee's office for this authority.

On the other side of the ledger, the appellee has demonstrated that the regulatory inspection act under Chapter 583, Florida Statutes, was carried on by 46 state inspectors, all of whom are state of Florida personnel, and all of whom have the individual authority to issue stop-sale orders on any poultry products they find to be unwholesome. The facts and evidence demonstrated that the Florida Department of Agriculture, pursuant to the pro-

visions of Chapter 583, Florida Statutes, condemned approximately 76,800 pounds of poultry as unfit for human consumption between July 1, 1963, and July 1, 1965, and that approximately one-half this condemned poultry had been previously inspected by inspectors of the U.S. Department of Agriculture and shipped from without the State of Florida. The facts and the evidence also showed that about 90 per cent of Florida processed poultry is for intrastate consumption and therefore does not have federal inspection for wholesomeness.

The Court below issued its findings of fact and conclusions of law on January 25, 1967, and its final judgment on February 9, 1967, entering judgment in behalf of the defendant-appellee and against the plaintiffs-appellants.

This statement is submitted to show that the appellants in this cause have improperly attempted to have this Court assume jurisdiction over the cause and that the questions attempted to be presented herein are so unsubstantial as not to need further argument.

OPINION BELOW

The opinion of the District Court for the Northern District of Florida, Tallahassee Division, dated January 25, 1967, and the final judgment dated February 9, 1967, both unreported, are printed herein as Appendix A.

STATUTES INVOLVED

Federal Poultry and Poultry Products Inspection Act, 21 U.S.C.A., §§ 451-469.

Florida Poultry Law, Chapter 583, Florida Statutes, 1961.

ARGUMENT

I. THE APPELLANTS HAVE IMPROPERLY ATTEMPTED TO HAVE THIS COURT ASSUME JURISDICTION OVER THIS CAUSE:

In *Swift v. Wickham*, 382 U.S. 111, 15 L. Ed. 2d 194, 86 S. Ct. 258, the Supreme Court dismissed an appeal for lack of jurisdiction involving questions of an amazingly similar parallel to the case at bar wherein plaintiffs in the *Wickham* case requested a three-judge court under 28 U.S.C., §2281, to enjoin the enforcement of a New York poultry inspection law on the ground that it would violate the commerce clause and the 14th Amendment of the Federal Constitution, and also because the overriding requirements of the federal law would violate the supremacy clause of the Constitution. In an opinion by the Honorable Justice Harlan expressing the views of six members of the Court, it was held that the commerce clause and 14th Amendment claims were too unsubstantial to support the jurisdiction of a three-judge court and that a suit to enjoin the enforcement of a state law solely on the grounds of a supremacy clause violation was not within the scope of 28 U.S.C., §2281.

Your appellee submits that this Court's *Wickham* decision was not rendered during the pendency of the trial but the case was decided on November 22, 1965, prior to the three-judge court in the instant cause entering its findings of fact and conclusions of law on January 25, 1967, and its final judgment on February 9, 1967. Your appellee therefore submits that the reasoning and application of the law in the *Swift* case, supra, would have application to the instant cause and this Court should dismiss the appeal for lack of jurisdiction.

II. THE QUESTIONS PRESENTED ARE UNSUBSTANTIAL:

It is the contention of the appellants that Congress, by passage of 21 U.S.C.A., Section 451, et seq., which is known as the Poultry and Poultry Products Inspection Act, has preempted the field of regulation of poultry and poultry products so as to exclude regulations of poultry and poultry products under the Florida Poultry Law and such rules and regulations as may be adopted pursuant to said law.

It is a well established legal principle that the test of whether both federal and state laws and regulations may operate, or whether or not the state regulation must give way, is whether or not both regulations can be enforced without impairing the federal superintendence or there are different objectives involved. Federal regulations of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained. *Florida Avocado Growers v. Paul*, 373 U.S. 132, 10 L. Ed. 2d 248, 83 S. Ct. 1210.

21 U.S.C.A., § 452, sets forth the congressional declaration of policy as follows:

> "It is declared to be the policy of Congress to provide for the inspection of poultry and poultry products by the inspection service as herein provided to prevent the movement in interstate or foreign commerce or in a designated major consuming area of poultry products which are unwholesome, adulterated, or otherwise unfit for human food."

The Federal Poultry Law is primarily directed to a determination of the wholesomeness of poultry and poultry products and of their fitness for human consumption prior to its entry into the stream of interstate commerce. The Florida Poultry Law has as its purpose the upgrading of quality and standards of poultry products to provide housewives and consumers in Florida with identifiable and ascertainable grades of edible poultry products in order that they might know what they are purchasing and consuming and to promote and encourage the upgrading of quality and standards of all poultry and poultry products sold or produced in the State of Florida. The Florida law further provides that it is unlawful for any person to sell fowl, live or dressed, which is unsound, unhealthful, unwholesome, diseased or otherwise unfit for human consumption. The Florida law thus attempts to regulate poultry and poultry products within the state prior to their distribution to the consumers to assure them that poultry and poultry products which they purchase are not only fit for human consumption but of a quality which is ascertainable and identifiable.

It is well established that a state may, in the absence of an express contrary command of Congress, confiscate or exclude from the market products which have complied with all the Federal processing standards because of a higher standard demanded by the state for its consumers. A state regulation so purposed is permissible under all the authorities. *Cloverleaf Butter Company v. Patterson*, 315 U.S. 148, 162, 86 L. Ed. 754, 62 S. Ct. 491, and cases therein collated.

In the instant case we have a Federal Poultry Act designed to prevent the entry of contaminated poultry products into the stream of interstate commerce, while the Florida law attempts to regulate the same products at the other end of the stream of

commerce in the same manner in which it regulates similar products which are solely intrastate in character. This Court held in the *Florida Avocado Growers* case that "Congressional regulation of one end of the stream of commerce does not, ipso facto, oust all state regulation at the other end. . . ."

In *Swift v. Wickham*, 230 F. Supp. 398 (June 1964), the United States District Court, in and for the Southern District of New York, considered the question of whether or not the Federal Poultry and Poultry Products Act preempted the field of regulation of poultry products so as to oust weight regulation and labeling requirements promulgated under New York's Agricultural Markets Law. The court held that the Federal Act had not preempted the field. The court, in dealing with almost the identical issue that we have in the instant case, made the following observations:

> "We must first consider whether by the mere enactment of the Poultry Inspection Act, Congress so 'occupied the field' as to oust all weight regulation by states into which federally inspected poultry or poultry products are shipped, irrespective of the consistency of the state and federal regulation. Some illumination is afforded by a series of cases that arose shortly after enactment of the Pure Food and Drug Act. The first, Savage v. Jones, supra, held that the provisions of §8 prohibiting a package or label that contained false or misleading statements of the contents, 34 Stat. 768, 770 (1906), did not invalidate a state statute requiring a tab or label affirmatively disclosing the ingredients. . . .
>
> "Multiplication of references to Supreme Court decisions in this general area would serve no useful purpose; it suffices for the present to cite the last bracketing pair, both de-

cided by the narrowest of margins. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963), sustained California's prohibition of the sale of avocados containing less than 8 per cent of oil by weight, as applied to Florida avocados whose maturity on picking was already controlled by compliance with regulations promulgated by the Secretary of Agriculture with special reference to Florida avocados, and which were certified by a Federal-State Inspection Service pursuant to regulations issued by the Secretary under the Agricultural Adjustment Act. 7 U.S.C. §§601 et seq., 48 Stat. 31 (1933). The Court reaffirmed that 'the principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusions, or that the Congress has unmistakably so ordained.' 373 U.S. at 142, 83 S. Ct. at 1217. As against this, Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 62 S. Ct. 491, 86 L. Ed. 754 (1942), had prohibited Alabama from seizing packing stock butter, not meeting the state standard, which had been acquired by an Alabama processor for use in manufacturing renovated butter for transportation in interstate commerce under federal regulations, Internal Revenue Code of 1939, §§2320-27, 53 Stat. 252, The Florida Avocado Growers majority distinguished Cloverleaf on the basis that 'Congressional regulation at one end of the stream of commerce does not, ipso facto, oust all state regulation at the other end,' 373 U.S. at 145, 83 S. Ct. at 1218, and pointed to the difference recognized in Cloverleaf 'between a confiscation which interferes with production under federal supervision and confiscation after production because of a higher standard demanded by a state for its consumers. The latter type is permissible under all the authorities.' 315

U.S. at 162, 62 S. Ct. at 499. This distinction necessarily recognizes that it is not inevitably unconstitutional for a state desiring 'a higher standard' for the protection of its consumers to confront a manufacturer in another state with the alternatives of taking steps not required by applicable federal law or not selling his goods in the enacting state.

"The general scheme of the Poultry Products Inspection Act does not suggest a Congressional purpose to create an exclusive system of regulation of the marketing of poultry; in particular, it does not suggest an intent to oust the states of their historic undertaking to safeguard their people from improper statements of weight. The legislative findings, 21 U.S.C. §451, and the declaration of policy, 21 U.S.C. §452, speaking of the need for protection against unwholesome poultry products and of the importance of providing for inspection 'to prevent the movement in . . . commerce . . . of poultry products which are unwholesome, adulterated, or otherwise unfit . . .', do not carry the application that any of these objectives would be frustrated if the states were to impose supplemental regulations, at the end of the stream of commerce, to insure accomplishment of these ends—much less if the receiving states should further regulate a subject which the Federal Act touches so slightly as weights. While the Act contains the quoted provisions as to labeling, these are merely incidental to the primary provisions for inspection of poultry products . . . We conclude that the plaintiffs cannot prevail on their general argument as to federal occupation of the field."

In the *Swift* case, the very issue which is before the Court today was decided, and the District Court found that Congress had not preempted the field of regulating poultry and poultry prod-

ucts. In so doing the Court merely affirmed the principles set forth in the *Florida Avocado Growers* case.

In *Swift* the District Court also distinguished the Federal Poultry Act from the legislation at issue in *Campbell v. Hussey*, 368 U.S. 297, 82 S. Ct. 327, 7 L. Ed. 2d 299 (1961), and stated that "there is a marked contrast with the importance attached in *Campbell v. Hussey* (citation), to the expressed intention to establish uniform standards in the *Tobacco Inspection Act*, 49 Stat. 731 (1935)."

The appellee believes that the *Swift* case is a correct interpretation of a long line of cases expressing the law of this country and that Congress, by passage of the Federal Poultry Act, has not preempted the field.

The lower Court's decision in the *Swift* case was affirmed in *Swift and Co. v. Wickham*, 364 F. 2d 241 (1966).

As to appellants' argument that the Florida Poultry Act, Chapter 583, Florida Statutes, 1961, has imposed a direct burden upon interstate commerce, your appellee urges that this proposition raises questions that are also unsubstantial.

The federal courts have consistently held that the Commerce Clause of the Federal Constitution does not extend to merchandise originating in interstate commerce after it comes to rest on the retail shelves for sale to the public. *Schechter Poultry v. United States*, 295 U.S. 495 (1935); *Southern Pacific Co. v. Gallagher*, 306 U.S. 167 (1939); *C. S. Smith Metropolitan Market v. Food and Grocery Bureau*, 33 F. Supp. 539 (D.C.S.D. Cal. 1939); *United States v. Food and Grocery Bureau*, 43 F. Supp. 974 (D.C.S.D. Cal., 1942) (and cases cited therein at page 977), aff'd 139 F. 2d 973 (9th Cir., 1944); *Veazey Drug v. Fleming*, 42 F. Supp. 689 (D.C.W.D. Okl. 1941); *Armour & Co. v. North*

Dakota, 240 U.S. 510 (1916); *Winer v. United States*, 228 F. 2d 944 (6th Cir., 1956), cert. den. 351 U.S. 906 (1956); *United States v. Independent Meat and Poultry*, 32 F. Supp. 317; *Greater New York Live Poultry v. United States*, 47 F. 2d 156 (D.C.N.J., 1940), cert. den. 283 U.S. 837 (1930); *United States v. Seligman*, 86 F. Supp. 114 (D.C.W.D Pa., 1949); *United States v. Matsumato*, 45 F. Supp. 668 (D.C.S.D., Fla., 1942); *Swift & Company v. Wikerson*, 124 F. 2d 176 (5th Cir., 1942).

In *Schechter Poultry* v. *United States*, 295 U.S. 495 (1935), Mr. Chief Justice Hughes defined interstate commerce which is subject to congressional regulation. He stated at p. 543:

> "The undisputed facts thus afford no warrant for the argument that the poultry handled by defendants at their slaughterhouse markets was in a 'current' or 'flow' of interstate commerce and was thus subject to congressional regulation. The mere fact that there may be a constant flow of commodities into a State does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the State and is there held solely for local disposition and use. So far as the poultry here in question is concerned, the flow in interstate commerce had ceased. The poultry had come to a permanent rest within the State. It was not held, used, or sold by defendants in relation to any further transactions in interstate commerce and was not destined for transportation to other States. Hence, decisions which deal with a stream of interstate commerce—where goods come to rest within a State temporarily and are later to go forward in interstate commerce—and with the regulations of transactions involved in that practical continuity of movement, are not applicable here. See *Swift & Co.* v. *United States*, 196 U.S. 375, 387, 388; *Lemke* v. *Farmers Grain Co.*, 258 U.S. 50,

55; *Stafford v. Wallace*, 258 U.S. 495, 519; *Chicago Board of Trade* v. *Olsen*, 262 U.S. 1, 35; *Tagg Bros. & Moorhead* v. *United States*, 280 U.S. 420, 439."

See also *United States* v. *Independent Meat & Poultry Market, Inc.*, 32 F. Supp. 317 (D.C.N. Jersey, 1940).

The rationale of the *Schechter Poultry* case, *supra*, is equally applicable to the case at bar. In the present case, the poultry comes into the state and is there held for local disposition. The poultry is not "destined for transportation to other states." The poultry is not introduced again into the stream of interstate commerce after it arrives in Florida, but, on the contrary, is used for local consumption and is distributed to retail stores in this state for that purpose.

CONCLUSION

The appellee respectfully urges this Court that the appellants have improperly attempted to have this Court assume jurisdiction over this cause and that the questions are so unsubstantial as not to need further argument.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

CANTON POULTRY, INC., GEORGIA BROILERS CORPORATION, COTTON PRODUCERS ASSOCIATION, d/b/a GOLDKIST POULTRY GROWERS, INC., and TIP TOP POULTRY, INC., Plaintiffs,

vs.

DOYLE CONNER, COMMISSIONER OF AGRICULTURE OF THE STATE OF FLORIDA, Defendant.

Tallahassee Civil Action No. 1033

Before JONES, Circuit Judge, and CARSWELL and McRAE, District Judges:

CARSWELL, District Judge:

Findings of Fact and Conclusions of Law

Plaintiffs, Georgia poultry processors, brought this action against the Florida Commissioner of Agriculture to restrain the enforcement of certain provisions of Chapter 583, Florida Statutes, relating to the inspection, grading and tagging of poultry products within the State of Florida[1] and the rules and regulations promulgated thereunder.[2]

1. Fla. Stat. §§ 583.13, 583.14, 583.17-583.20 (1961).

2. Florida Administrative Code, Rules of the Department of Agriculture, Chapter 7E-7.02, .05, .06, .09.

This Court was convened in accordance with the provisions of 7 U. S. C. 1621, et seq.; 21 U. S. C. 451, et seq.; and 28 U. S. C. 2281, et seq.

Plaintiffs contend that the subject Florida laws and regulations are unconstitutional as applied to them because: (1) they unduly burden interstate commerce; (2) the federal law has preempted the field of poultry inspection and regulation; and (3) its application to plaintiffs denies them equal protection of the laws in violation of the 14th Amendment.

FINDINGS OF FACT

The plaintiffs are owners and operators of establishments which process poultry for transportation and sale in interstate commerce, much of it within the State of Florida. Poultry is inspected in these plaintiffs' establishments before interstate shipment by United States Department of Agriculture inspectors pursuant to the Federal Poultry and Poultry Products Inspection Act[3] and the rules and regulations promulgated thereunder.[4] The Florida statutes, together with its rules and regulations, provide for the inspection, grading and tagging of poultry products sold within the State of Florida and authorize the collection of an inspection fee to defray the expenses of administering the statute. The inspection fee is payable to the first person to sell, offer for sale, or hold for the purpose of sale in Florida any dressed poultry on which the inspection fee has not been paid.[5]

The Florida law also provides for the grading of poultry according to standards of quality as established

3. 21 U.S.C. §§ 451-469 (1957).
4. 7 CFR §§ 70.1-81.207.
5. Fla. Stat. § 583.18(4) (1961).

by the Act.[6] The evidence presented on trial shows that a thorough federal inspection of plaintiffs' poultry for wholesomeness is made at plaintiffs' establishments outside Florida. The evidence also shows, however, that there is only very limited federal inspection of poultry shipped into the State of Florida. It was established here that there are only three United States regulatory inspectors charged with the responsibility of checking some 9,913 retail stores and some 200 wholesale outlets in Florida. Moreover, one of these three men must perform some duties in six other southeastern states, averaging about ten weeks a year in Florida. Another federal inspector, the record shows, is actually assigned to the southwestern Georgia area and only rarely performs inspection work in Florida. The remaining federal inspector does devote virtually all of his time to his official duties within Florida, but can only cover a small percent of Florida outlets for poultry.

Any poultry in Florida discovered by the federal inspector to be contaminated must actually be removed from public sale by a stop sale order issued under the provisions of the Florida poultry law.[7] The federal inspector makes application to the State Commissioner's office for this authority.

The extent of inspections made by Florida personnel is in strong contrast to the limited volume of regulatory inspection made by the United States Department of Agriculture. During 1964 there were 42,254 regulatory inspections made at nearly all of the retail and wholesale outlets which distribute poultry in Florida. This regulatory inspection work was carried on by 46 inspectors, all of whom are State of Florida personnel and all of whom have

6. Fla. Stat. § 583.17 (1961).
7. Fla. Stat. § 583.18(2) (1961).

the individual authority to issue stop sale orders on any poultry products they find to be unwholesome. The Florida Department of Agriculture condemned approximately 76,800 pounds of poultry as unfit for human consumption between July 1, 1963, and January 1, 1965. Significantly, approximately one-half of this condemned poultry had been previously inspected by inspectors of the United States Department of Agriculture and shipped from without the State of Florida. The evidence shows that about 90% of Florida processed poultry is for intrastate consumption, and, therefore, does not have federal inspection for wholesomeness.

CONCLUSIONS OF LAW

Plaintiffs first contend that the Florida poultry law is unconstitutional as an undue burden on interstate commerce. We disagree.

We note at the outset that the Florida law operates after the product has completed its interstate journey and has lost its character as interstate commerce. The police power of the state is therefore exerted after the product acquires its character as intrastate commerce.[8]

The Florida law provides for the inspection, grading and tagging of poultry products sold within the state. A state may adopt measures for the health and safety of its people although commerce may incidentally be involved. See *Sligh* v. *Kirkwood*, 237 U. S. 52 (1915).

About 38,000 pounds of federally inspected poultry shipped into Florida over an eighteen months period was subsequently condemned by the State. In light of this finding, it cannot seriously be contended that the Florida law is not protective of the health and safety of the State.

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8. Fla. Stat. § 583.16 (1961).

State legislation, based on police power, which does not discriminate against interstate commerce is not is not in conflict with the Commerce Clause. See *Huron Portland Cement Co.* v. *City of Detroit*, 362 U. S. 440, 80 S. Ct. 813, 4 L. Ed. 2d 852. The state act is applied to locally produced poultry offered for sale in Florida as well as poultry shipped into the State. Any burden which might result from compliance with the state law rests equally upon the local distributors, and is therefore nondiscriminatory.

It is the second contention of plaintiffs that Congress, by passage of the Federal Poultry and Poultry Products Inspection Act has preempted the regulation of poultry so as to exclude poultry regulation by Florida.

The facts are persuasively to the contrary. Moreover, the federal poultry act is primarily designed to prevent the entry of contaminated poultry into the stream of interstate commerce. This is insured by the extensive federal poultry inspection at the plaintiffs' warehouses before interstate shipment. The Florida law, however, regulates the same product at the other end of the stream of commerce in the same manner in which it regulates similar products which are solely intrastate in character. The Supreme Court held in *Florida Lime & Avocado Growers* v. *Paul*, 373 U. S. 132, 83 S. Ct. 1210, 10 L. Ed. 2d 248, that "Congressional regulation of one end of the stream of commerce does not, ipso facto, oust all state regulation at the other end. . . ." See also *Swift* v. *Wickham*, 230 F. Supp. 398 (S. D. N. Y. 1964), wherein it was held that the federal poultry law did not preempt weight and labeling regulations promulgated under New York's Agricultural Markets Act.

We also note here in consideration of all of plaintiffs' arguments the highly perishable character of poultry prod-

ucts, the geography of the area which requires out of state poultry shipments into Florida to move considerable distances, especially to metropolitan areas at the southern extremity of the peninsula, and particularly the fact that federal inspection is patently insufficient to protect the well being of the poultry consuming public within the State of Florida.

Finally, we cannot say that plaintiffs have been denied the equal protection of the law as assured by the Constitution. The Florida poultry law as applied to these plaintiffs is not arbitrary or unreasonable. See *Allied Stores of Ohio* v. *Bowers*, 358 U. S. 522, 79 S. Ct. 437, 3 L. Ed. 2d 480. Upon this record we find plaintiffs' contention that their compliance with both federal and state poultry laws works to their economic disadvantage, although plaintiffs concede that Florida processors who ship only in intrastate commerce are also subject to the same tax and tagging provisions.

Accordingly, judgment is entered for defendant.

DATED this 25th day of January 1967.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CANTON POULTRY, INC., GEORGIA BROILERS CORPORATION, COTTON PRODUCERS ASSOCIATION, d/b/a GOLDKIST POULTRY GROWERS, INC., and TIP TOP POULTRY, INC.,
Plaintiffs,
vs.
DOYLE CONNER, COMMISSIONER OF AGRICULTURE OF THE STATE OF FLORIDA,
Defendant.

Tallahassee Civil Action No. 1033

Final Judgment

(Filed February 10, 1967)

In accordance with findings of fact and conclusions of law entered this date and the Court having determined therein that judgment should be entered in behalf of the defendant and against the plaintiff, it is, therefore, hereby

ORDERED that judgment be and it is hereby entered for the defendant and against the plaintiff with costs to be taxed against the plaintiff by the Clerk of this Court in accordance with law.

DONE AND ORDERED this 9th day of February, 1967.

/s/ Warren L. Jones

Warren L. Jones
United States Circuit Judge

/s/ G. Harrold Carswell

G. Harrold Carswell
United States District Judge

/s/ Wm. A. McRae, Jr.

William A. McRae, Jr.
United States District Judge

APPENDIX B

Florida Poultry Law

CHAPTER 583

Florida Statutes, 1961

CLASSIFICATION AND SALE OF POULTRY

583.01 *Definitions.*—In construing this chapter, where the context permits, the words, phrases, or term:

(1) "Commissioner" within the intent and purposes of this chapter shall mean the Florida commissioner of agriculture.

(13) "Dealer" in poultry shall mean any person, firm or corporation, including processors and retailers, engaged

in the business of selling, offering for sale or holding for the purpose of sale in this state any dressed poultry in excess of one hundred pounds in any one week, that are free from disease.

(14) "Broker" shall mean any person, firm or corporation who sells dressed poultry in this state for a dealer on a commission basis.

(15) "Processor" shall mean any person, firm or corporation slaughtering and dressing poultry for commercial purposes.

(16) "Poultry" shall mean all kinds of poultry and shall include chickens, turkeys, ducks, guineas, geese, pigeons and other domesticated food birds.

583.04 *Promulgation of regulations.*—The commissioner of agriculture may make and promulgate such regulations as may be necessary to carry out the provisions of this chapter.

583.06 *Employment of assistants.*—The commissioner of agriculture may employ such assistants as are necessary to carry out and enforce the provisions of this chapter, such assistants to be paid out of the general inspection trust fund.

583.12 *Live and dressed poultry.*—Live and dressed poultry are classified as:

(1) Live poultry, construed to mean fowl, not diseased, to be slaughtered for human consumption.

(2) Florida dressed, construed to mean any fowl, free of disease, slaughtered and offered for sale in Florida, that have not been hard-chilled or frozen.

(3) Shipped (state of origin) dressed, construed to mean any fowl, free of disease, produced and slaughtered

outside of Florida, that have not been hard-chilled or frozen.

(4) Quick frozen, or frozen, construed to mean any fowl that have been processed, packed, sealed and frozen in strict conformity with accepted standards for quick freezing, or frozen, that have not developed any appearance of cold storage stock and show no evidence of deterioration from freezing.

(5) Storage (or cold storage) fowl, construed to mean all fowl free from disease and regardless of where slaughtered, that show evidence of deterioration from freezing or that which have been held at low temperature for sixty days or more.

583.13 *Dealers to mark slaughtered poultry as to grade.*—

(1) It is unlawful for any dealer or broker to sell, offer for sale, or hold for the purpose of sale in the state any slaughtered poultry without clearly imprinting thereon or attaching thereto a label or tag, not less than two inches in diameter on which shall be plainly and legibly printed the classification, grade and standard to which the same belong. Whenever shipped, fresh dressed or cold storage poultry are sold, offered for sale, or held for the purpose of sale packed in a container other than an air-tight container, such container shall have affixed a label, not less than two inches by four inches on which shall be plainly and legibly printed in letters not less than three-eighths inch in height, the classification, grade and standard to which the contents of such container belong.

(2) It is unlawful to offer poultry for sale in any newspaper advertisement, circular, radio, or other form of advertising without plainly designating in such adver-

tisement the classification, grade, and standard to which the poultry being offered for sale properly belong.

(3) It is unlawful for any person, firm or corporation to use dressed poultry in the preparation of food served to the public, or to hold dressed poultry for the purpose of such use, unless such dressed poultry has clearly imprinted thereon or attached thereto a label or tag, not less than two inches in diameter, on which shall be plainly and legibly printed the classification, grade and standard to which the same belong. Whenever shipped, fresh dressed or cold storage poultry are used in the preparation of food served to the public, or held for the purpose of such use, packed in a container other than an air-tight container, such container shall have affixed a label, not less than two inches by four inches on which shall be plainly and legibly printed in letters not less than three-eighths inch in height the classification, grade and standard to which the contents of such container belong.

583.14 *Certification of poultry dealers.*—It is unlawful to sell, offer for sale, or hold for the purpose of sale any poultry as a dealer or broker unless such person has obtained from the commissioner of agriculture a certificate authorizing such person to engage in the business of selling poultry in Florida. Such certificate shall be subject to revocation by the commissioner of agriculture for cause. All such certificates shall be permanent registration and effective until revoked; provided that all certificates heretofore or hereafter issued shall serve as valid certificates until replaced with permanent certificates by the commissioner of agriculture.

583.15 *Reports of poultry dealers.*—The commissioner of agriculture may require every dealer and broker granted a certificate and every person, firm or corporation, using

dressed poultry in the preparation of food served to the public on which inspection fee has not been previously paid to keep records of all purchases, sales, receipts or other transactions pertaining to the sale, purchase or use of dressed poultry and to mail to the office of the commissioner of agriculture at Tallahassee, duplicate copies of all invoices, or equivalent information, showing the consignor, the consignee, the quantity, source and classification of poultry included in each purchase or sale, or such other information as the commissioner may require; and the commissioner may prescribe the forms to be used to give such information.

583.16 *Interstate shipments exempt.*—This law shall not apply to any shipment of live or dressed poultry while the same constitutes a bona fide shipment in interstate commerce, but shall apply at the very instant when an interstate shipment comes to rest within the state and the police power may be asserted thereon, or whenever such interstate shipment loses its character as such.

583.17 *Grades and standards for fowls.*—The commissioner of agriculture may determine, establish and promulgate, from time to time reasonable grades and standards of quality as to each or all of the classifications for fowl to be sold or offered for sale in the state, such as will, in his judgment, promote honest and fair dealing in the interest of the consumer; and he may alter or modify such grades and standards of quality from time to time, as in his judgment honest and fair dealing in the interest of the consumer may require; provided, however, that the grades and standards of quality so fixed by the commissioner of agriculture shall be based upon requirements not exceeding the requirements necessary to meet the grades and standards of quality prescribed by the United States department of agriculture, or which may hereafter be pre-

scribed by such United States department of agriculture, and the tolerance to be allowed shall be the same as is allowed in each grade or standard of quality by the United States department of agriculture.

The commissioner of agriculture may also make and promulgate such regulations as may be necessary to carry out the provisions of this law.

583.18 *Inspection by commissioner.*—The commissioner of agriculture, his inspectors or agents, in carrying out the provisions of this law:

(1) (a) May enter on any business day during the usual hours of business, any store, market or other building or place where poultry is sold, offered for sale, or held for the purpose of sale, in order to ascertain by inspection whether in the exhibition of such poultry all of the provisions and conditions of this chapter or any rule or regulation duly promulgated in relation to the sale, offering for sale, or holding for the purpose of sale have been complied with.

(b) May upon good and sufficient cause to believe that any of the provisions of this law are being violated, stop and inspect any truck or other vehicle engaged in the transportation of poultry upon the highway, to be sold, offered for sale, or held for the purpose of sale in Florida, and to make such examination or inspection thereof as is necessary to ascertain whether all of the provisions of this chapter or any rule or regulation duly promulgated thereunder relating to the quality and wholesomeness, grade and standard required by the provisions of this law have been complied with.

(2) May issue and enforce a stop sale notice or order, or a stop use notice or order, to the owner or custodian

of any lot of poultry which the commissioner or his inspectors or agents find, or have good reason to believe, are in violation of any of the provisions of this law or any regulation issued hereunder, which shall prohibit further sale, barter, exchange, distribution or use of such poultry until the commissioner of agriculture is satisfied that the law or regulation has been complied with and has issued a written release or notice to the owner or custodian of such poultry.

(3) May enter on any business day during the usual hours of business any restaurant kitchen, hotel dining room kitchen, or the kitchen of any other public eating place where dressed poultry is used in the preparation of food served to the public, and to make such examination and inspection thereof as is necessary to ascertain whether all of the provisions of this chapter or any rule or regulation duly promulgated thereunder relating to the quality and wholesomeness, grade and standard required by the provisions of this law have been complied with.

(4) An inspection fee of not less than one-eighth of one cent per pound nor more than one-fourth of one cent per pound is hereby imposed, and shall be paid to the commissioner of agriculture on all dressed poultry sold by dealers in this state and on all dressed poultry used in the preparation of food served to the public, if the fee had not been previously paid, which said inspection fee shall be paid by the dealer who first sells, offers for sale or holds for the purpose of sale dressed poultry in this state or by any person, firm or corporation using dressed poultry in the preparation of food served to the public, on which inspection fee has not been previously paid.

It is unlawful for any dealer to sell, offer for sale or hold for the purpose of sale in this state any dressed

poultry on which said inspection fee shall not have been paid, and it is unlawful to use, or hold for the purpose of use, in this state any dressed poultry in the preparation of food served to the public on which said inspection fee shall not have been paid. The manner of collection of such inspection fee shall be as prescribed by the commissioner of agriculture who is hereby authorized to so prescribe and enforce the method and manner of collecting same. All such fees so collected shall be paid into and become a part of the general inspection trust fund of the state.

(5) The possession of more than one hundred pounds of dressed poultry in any one week by any dealer or broker or any person, firm or corporation using dressed poultry in the preparation of food served to the public, shall be deemed held for the purpose of sale or for the purpose of use in the preparation of food served to the public.

538.19. *Sale of unsound, etc., fowls prohibited.*—It is unlawful for any person to sell fowl, live or dressed, which is unsound, unhealthful, unwholesome, diseased or otherwise unfit for human consumption.

583.20 *Penalties for violations of chapter.*—

(1) Any person violating any provision of this chapter, or any rule or regulation promulgated by the commissioner of agriculture within this chapter, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be imprisoned in the county jail for not more than ninety days or shall be fined in a sum not less than fifty dollars nor more than two hundred dollars. In addition thereto, the commissioner may revoke the certificate of any dealer convicted of any violation of this chapter.

(2) In addition to the remedies provided in this chapter and notwithstanding the existence of any adequate remedy at law, the commissioner of agriculture is hereby authorized to apply by a bill in equity to a circuit court or circuit judge and such circuit court or circuit judge shall have jurisdiction upon hearing and for cause shown to grant a temporary or permanent injunction, or both, restraining any person from violating or continuing to violate any of the provisions of §§ 583.01, 583.05, 583.09, 583.12, 583.14, 583.18, 583.20 or from failing or refusing to comply with the requirements of said §§ 583.01, 583.05, 583.09, 583.12, 583.14, 583.18, 583.20 or any rule or regulation duly promulgated as in § 583.04 authorized. Such injunction shall be issued without bond.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

CANTON POULTRY, INC. ET AL. *v.* CONNER.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA.

No. 1315. Decided June 12, 1967.

PER CURIAM.

The judgment is vacated and the case remanded to the District Court so that it may enter a fresh decree from which a timely appeal may be taken to the Court of Appeals. *Pennsylvania Public Utility Comm'n* v. *Pennsylvania R. Co.*, 382 U. S. 281, 282.